UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC.		
and	Case Nos.	28-CA-22175
		28-CA-22289
INDEPENDENT CERTIFIED EMERGENCY PROFESSIONALS OF ARIZONA, LOCAL #1		28-CA-22338
		28-CA-22350

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. LEGAL ARGUMENT

A. General Counsel mischaracterizes the issue and case law

As outlined in Respondent's Motion for Summary Judgment, in this case, the Region seeks to impose a union on a group of nearly 300 employees who have not chosen that union. This union has never achieved majority status and currently does not enjoy majority support. There is no dispute that the National Labor Relations Act (the "Act") does not require an employer to bargain with a union that does not have majority status.

Additionally, all allegations of unilateral change and bad faith bargaining depend on the existence of a valid collective bargaining relationship. Accordingly, the issue of majority support is the key issue in this case.

The cases cited by General Counsel in its brief are mischaracterized and are distinguishable on their facts in significant respects. The General Counsel's case is based on case law where, notwithstanding an absence of majority at the time of recognition,

such defect is cured by the subsequent ripening into successive collective bargaining contracts. No such contract ever resulted herein. Here there was no ripening, and therefore, no cure. For this reason, as well as the reasons set forth below, Respondent's Motion for Summary Judgment should be granted.

1. *The Union does not now, nor has it ever, obtained majority support*

The General Counsel begins its response to the Motion for Summary Judgment by stating, erroneously, that "Respondent's sole basis for demanding summary judgment is its contention that, when it first recognized the Union over three years ago, the Union lacked majority status." (Response at p.1). This statement is completely incorrect. In fact, Respondent is contending, and has contended, and continues to contend, that the Union has never enjoyed majority status. In other words, not only was the original recognition unlawful due to the lack of majority status, the Union continues, even to this day, to lack majority support. Accordingly, the cases cited by the General Counsel in which the employer was challenging only the original recognition are distinguishable.

For example, the General Counsel's response cites, Alpha Associates and Union of Needletrades, Industrial & Textile Employees (UNITE), AFL-CIO, CLC, 344 NLRB 782 (2005). In the case, the Board noted specifically "The Respondent here does not suggest that the Union no longer possesses majority support." *Id.* at 785. This fact is pivotal for it is a different case than the facts defining the instant matter.

Here, Respondent clearly does strongly suggest that the Union no longer possesses (and indeed never has possessed) majority support. *See,* Respondent's Motion for Summary Judgment at p. 2 ("In the Region's view, the Board can now simply ignore

evidence that the union does not currently enjoy majority status and compel bargaining that is clearly *prohibited* by the Act.").

The cases cited by the General Counsel all appear to deal with factually distinguishable situations. Namely, as described above, the cases do not deal with an employer's challenge to a union's current status. Rather, the cases appear to be limited to challenges based only on the original voluntary recognition. Accordingly, the cases cited in General Counsel's Opposition are distinguishable and inapposite. Respondent's Motion for Summary Judgment should be granted.

2. *The cases cited by the General Counsel dealt with situations where collective bargaining agreements had been reached*

As outlined in Respondent's Motion for Summary Judgment, the Region apparently relies upon the reasoning found in Pekowski Enterprises, Inc. v. International Brotherhood of Teamsters, 327 NLRB 413 (1999) and similar cases for the proposition that an employer cannot withdraw recognition of a union based on a challenge to majority status at the time the employer granted recognition. Thus, the Region argues, there is now a presumption that the Union has majority status based solely on PMT's voluntary recognition of the Union.

However, the Region's reliance on Pekowski and similar cases is inappropriate as those cases are distinguishable from the matter at hand. Importantly, in the cases cited by the Board, the employers attempted to challenge their earlier voluntary recognitions despite having entered into collective bargaining agreements with the various unions. For

example, in Pekowski, the parties had entered into collective bargaining agreements that covered a nearly four year period, from 1992-1996. Id. at 414.

Similarly, in Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 80 S.Ct. 822 (U.S. 1960), relied upon by the General Counsel, the parties had entered into a collective bargaining agreement before the employer even argued that its original voluntary recognition was improper because the union did not enjoy majority support at the time of recognition. Id. at 419, 80 S.Ct. at 828.

In Jim Kelley's Tahoe Nugget, 227 NLRB 357 (1976), also relied upon by the General Counsel, the parties had successive collective bargaining agreements covering a fourteen year period. *See also,* Strand Theatre of Shreveport Corp, 346 NLRB 523, 536-37 (2006) (where parties had entered into collective bargaining agreements covering the period from 1999 through 2004); Royal Components, Inc., 317 NLRB 971 (1995) (parties had entered into collective bargaining agreements covering period from 1990 through 1995).

The common theme of the cases cited by the General Counsel is that the parties had years of collective bargaining agreements that were entered into. Accordingly, the presumption upon which the General Counsel relies appears to be limited to situations where a collective bargaining agreement has been entered into between the parties. *See, e.g.,* Bartenders Ass'n of Pocatello, 213 NLRB 651, 652 (1974) ("And, since Respondent recognized the Union and entered into bargaining agreements with it, this gives rise to the presumption that the Union's majority representative status has continued."); Auciello Iron Works, Inc. v. NLRB, 517 US 781, 786 (1996) (holding that

union is entitled to conclusive presumption of majority status during the term of any collective-bargaining agreement up to 3 years).

Here, as between Respondent and the Union, no such collective bargaining agreement has ever been entered into. Indeed, the Charging Party Union has frustrated agreement at every turn. Accordingly, the original defect in the voluntary recognition was never cured by the entering into of a collective bargaining agreement. Thus, the cases cited by the General Counsel are inapposite.

Finally, the very presumption upon which the Region relies was rejected by the D.C. Circuit in Nova Plumbing v NLRB, 330 F.3d 531 (D.C. Cir. 2003). There, the Court stated "Because the Board relied solely on a contract provision suggesting that the company and the union intended a 9(a) relationship despite strong record evidence that the union may not have enjoyed majority support as required by section 9(a), we hold that the Board failed to protect the employees' section 7 rights "to bargain collectively through representatives of their own choosing." *Id.* at 533. Thus, the D.C. Circuit, which will have jurisdiction over any appeals in this matter, has already rejected the presumption of majority relied upon by the Region to establish the Union's majority status. Accordingly, Respondent's Motion for Summary Judgment should be granted.

3. *The General Counsel does not dispute that current law regarding voluntary recognition was not complied with*

Respondent's Motion for Summary Judgment raised the point that the law regarding voluntary recognition was not complied with and therefore any voluntary recognition was invalid. The General Counsel did not dispute this point in its Response.

Accordingly, on that point, Respondent's motion should be granted. *See* Section 102.24(b) *NLRB Rules and Regulations, Part 102* ("If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, shall be entered.").

Regardless, Board law is clear that any voluntary recognition, whether it be through contract language, card checks, conduct, or otherwise, is dependent on a recognition and request by the union on a confirmation of the union's majority status. The Board in McLaren Health Care Corp., 333 NLRB 256, 258 (2001) stated, "voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and subsequently confirms the union's majority status through that procedure. The Board and the courts have refused to find that a binding recognition agreement exists unless both of those requirements are satisfied." Thus, the Board's law requires: 1.) a procedure for checking majority status and; 2.) a confirmation of majority status through that procedure.

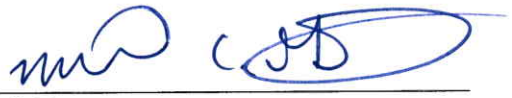
In this case, there has been neither. PMT has submitted proof that there has never been a card check, petition, or election. The Region has submitted nothing to establish that majority status was ever confirmed or checked. Thus, it is clear that the voluntary recognition was invalid. Accordingly, Respondent's Motion for Summary Judgment should be granted.

II. CONCLUSION

The unfair labor practice charges against Respondent are without merit. Nonetheless, the defense of those charges will take days to weeks of Respondent's time, the Region's time, and subject all parties involved to significant expense. This result can be avoided if the Respondent's Motion for Summary Judgment is granted. As outlined above, the facts, the law, and the equities favor Respondent in this matter. Accordingly, based on all the foregoing, Respondent is entitled to judgment as a matter of law and the Complaint should be dismissed without a hearing before an administrative law judge.

DATED this 12th day of June, 2009.

SHERMAN & HOWARD L.L.C.



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I certify that I caused a copy of the foregoing to be electronically filed this 12th day of June, 2009, and that a

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